INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writs	6
Conclusion	16

Appendix A	1a
Appendix B	2a
Appendix C	6a
Appendix D	7a

CITATIONS

CASES:

Barrentine v. *U.S.*, 434 F.2d 636 (9th Cir. 1970) 7
California v. *Mercurio*, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970) 13
Carpio v. *Superior Court, County of Santa Barbara*, 19 Cal. App. 3d 790, 97 Ca. Rptr. 186 (1971) 13
Carroll v. *U.S.*, 267 U.S. 132 (1925) 10
Chapman v. *California*, 386 U.S. 18 (1967) 15, 16
Cooper v. *California*, 386 U.S. 58 (1967) 11
Dyke v. *Taylor Implements Mfg. Co.*, 391 U.S. 216 (1967) 7, 8
Fahy v. *Connecticut*, 375 U.S. 85 (1963) 15, 16
Gonzales v. *State*, — Okla. Cr. —, 12 Cr. L. Rptr. 2537 (decided March 13, 1973) 10
Grundstrom v. *Beto*, 273 F. Supp. 912 (N. D. Tex. 1967) 7

Page

Harrington v. *California*, 395 U.S. 250 (1969) 16
Harris v. *U.S.*, 390 U.S. 234 (1968) 11, 12
Holland v. *State*, 93 Okla. Cr. 180, 226 P.2d 448 (1951) 8
Lane v. *State*, 424 S.W.2d 925 (Tex. Cr. 1967) 7
Miranda v. *Arizona*, 384 U.S. 436 (1966) 5
People v. *Greenwood*, 484 P.2d 1217 (Colo. Sup. Ct. *En Banc*, 1971) 13
People v. *Miller*, 7 Cal. 3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972) 12
People v. *Overlee*, 483 P.2d 222 (Colo. Sup. Ct., *En Banc*, 1971) 13
People v. *Superior Court of Los Angeles County* [*Simon*], 101 Cal. Rptr. 837, 496 P.2d 1205 (*en banc*) 7
Pigford v. *U.S.*, 273 A.2d 837 (D.C. Ct. App. 1971) ... 11
Preston v. *U.S.*, 376 U.S. 364 (1964) 14
State v. *Ashby*, Fla. 245 So.2d 225 8
State v. *Coles*, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969) 7
State v. *Giragosian*, — R.I. —, 270 A.2d 921 (1970) 7
State v. *Gustafson*, Fla. 258 So.2d 1 (1972) 7
Stidham v. *Wingo*, 452 F.2d 837 (6th Cir. 1971) 7
Terry v. *Ohio*, 392 U.S. 1 (1967) 9, 11, 13
U.S. v. *Adams*, 424 F.2d 175 (5th Cir. 1970) 10, 13
U.S. v. *Davis*, 441 F.2d 28 (9th Cir. 1971) 7
U.S. v. *Humphrey*, 409 F.2d 1055 (10th Cir. 1969) 7
U.S. ex rel. Krogness v. *Gladden*, 242 F. Supp. 499 (D. Ore. 1965) 7
U.S. v. *Mills*, — F.2d —, D.C. Cir., No. 22, 444, decided May 10, 1972 (*en banc*) 13
U.S. v. *One 1963 Cadillac Hardtop*, 224 F. Supp. 210 (E.D. Wis. 1963) 7
U.S. v. *Pannell*, 255 A.2d 925 (D.C. Ct. App. 1969) 11
U.S. v. *Robinson*, D.C. Cir., No. 23-734, decided October 31, 1972 (*en banc*), cert. granted, No. 72-936, March 19, 1973, 41 L. W. 3493 .....7, 8, 9, 13, 14
U.S. v. *Simmons*, D.C. Ct. App., No. 6511, decided March 8, 1973, 12 Cr. L. Rptr. 2536 ..... 7, 8
Watts v. *State, Miss.*, 196 So.2d 79 (1967) 7
Weeks v. *U.S.*, 232 U.S. 383 (1914) 10
Williams v. *U.S.*, 107 A.2d 223 (D.C. Mun. Ct. App. 1961) 11

STATUTES: Page

Code of Virginia:

Sec. 1-179 .....10, 12
Sec. 4-56 10
Sec. 8-646.3 10
Sec. 8-646.5 10
Sec. 18.1-103 10
Sec. 18.1-107.1 10
Sec. 46.1-2 11
Sec. 46.1-290 4
Sec. 46.1-351.1 10

28 U.S.C. § 1257 (3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

RONALD EUGENE ALL, *Petitioner,*

v.

STATE OF NORTH CAROLINA, *Respondent.*

CARLTON OSCAR WEAVER, *Petitioner,*

v.

STATE OF NORTH CAROLINA, *Respondent.*

Joint Petition for Writs of Certiorari to the Supreme Court of North Carolina and the Court of Appeals of North Carolina

Petitioners Ronald Eugene All and Carlton Oscar Weaver pray that writs of certiorari be issued to review the judgments and order of the Supreme Court of North Carolina, which was filed in this proceeding on March 6, 1973, denying the petitioners' petitions to the Supreme Court of North Carolina for writs of certiorari to review the opinion and judgments of the Court of Appeals of North Carolina, which latter opinion and judgments were filed on January 17, 1973. Both judgments involve identical and closely related questions.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at 17 N.C. App. 284, 193 S.E.2d 770 (1973) and is reproduced in Appendix A. The denial by the Supreme Court of North Carolina of certiorari in these causes is reported at 17 N.C. App. 284, 193 S.E.2d 633 (1973), and is reproduced in Appendix B.

JURISDICTION

The judgments of the Supreme Court of North Carolina were entered on March 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Whether it is constitutionally permissible under the Fourth and Fourteenth Amendments to the Constitution of the United States for state law enforcement officers to conduct a general exploratory search of a motor vehicle without either probable cause or reasonable suspicion on objective consideration to believe the occupants guilty of any offense other than a traffic violation?

Subsidiary issues presented are as follows:

A. Whether a general search of the vehicle not tied to the need to obtain evidence of the traffic offense or to protect the police officers against concealed weapons is justified?

B. Whether such a general search may be justified as a police inventory where the police neither purport to be animated by the need for an inventory nor take measures consistent with an authentic inventory?

C. Whether impoundment and inventorying, pursuant to an arrest for a traffic violation, are constitutionally permissible when (1) impoundment is not authorized by statute or other legal authority, or (2) when the inventory occurs before the arrestee has been afforded an opportunity to make bail in lieu of incarceration?

II. Whether the test of "harmless constitutional error" in criminal trials under *Fahy* v. *Connecticut* and *Chapman* v. *California* turns merely upon whether a conviction could have been sustained without the tainted evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this petition for writs of certiorari are the Fourth and Fifth Amendments to the United States Constitution in so far as they imbody fundamental rights guaranteed by the Fourteenth Amendment to the United States Constitution. These provisions are set forth in Appendix C, *infra,* pp. 6a-7a.

STATEMENT OF THE CASE

Petitioners Ronald Eugene All and Carlton Oscar Weaver were convicted in the Superior Court of Chatham County, North Carolina, for breaking and entering into a meat packing plant and for the larceny of packaged hams and loose hams therefrom.

On March 20, 1971, while driving a truck on an interstate highway in the State of Virginia, Petitioner Ronald All, accompanied by Petitioner Carlton Oscar Weaver, was stopped by an officer of the Virginia State Police, who had no reports of any criminal activity relating to the petitioners. The patrolman sig-

nalled them to pull to the shoulder of the road because he observed that Mr. All was driving the vehicle with all but 10 to 12 inches of the front windshield obscured by a piece of cardboard, which had been inserted across the dashboard to replace the shattered part of the windshield. Under a Virginia statute, driving with any obstruction over the windshield is a traffic violation. Code of Virginia, Sec. 46.1-290.

Upon making an inspection of the driver's license, registration card and license tags, the officer learned that the truck was registered in the name of Petitioner Weaver's wife. The officer then climbed up on the truck's axle and peering over the truck's side boards saw that it was loaded with assorted sliced and whole hams. The side boards to the truck bed were high enough to block the officer's view of the cargo while he was standing on the ground. (R. 11-16.)[1]

The officer interrogated each of the petitioners in isolation about where they had obtained the load of hams and received conflicting stories. The officer then placed Mr. All under arrest for reckless driving and took him to the nearest sheriff's office. Suspecting that, as he testified, "I had a felony on my hands", the officer alerted the investigative division of the state police, and had another officer drive the truck to the sheriff's office where it was parked. According to the officer's testimony, he brought Mr. All before a magistrate who set bond. (R. 15-16.)

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[1] References prefaced with the initial "R." are to the Record prepared for the Court of Appeals of North Carolina, which has been certified to this Court. Occasional references prefaced "Tr." are to the verbatim transcript of the trial, only portions of which are reproduced in the Record.

While Petitioner All was still in custody, the Virginia State Police received a radio report of the theft of a large quantity of hams from a meat packing plant in North Carolina. However, the radio report contained no description either of the suspects or of the vehicle involved in the crime. Then, a detective from the investigation division interrogated All and after hinting at leniency for All, obtained a confession in which Mr. All informed the detective that a pair of bolt cutters which had been used to break and enter the meat plant could be found in the cab of the truck. Thereupon, without obtaining a search warrant, the detective searched the cab of the truck and seized the bolt cutters that he found there. (R. 17-19.)

Petitioner All and Petitioner Weaver were returned to North Carolina where they stood trial for the theft of the hams. The trial court denied the petitioners' motion to suppress as evidence the cargo of hams on the grounds that the Virginia highway patrolman "had a right to stop the defendants and the truck for an apparent violation of Virginia law and to inspect the vehicle after stopping it" (R. 25.). Although suppressing the statements given to the patrolman as being inconsistent with *Miranda*,[2] and Mr. All's confession because it was induced by indirect promises of leniency, the trial judge refused to suppress the bolt cutters because he ruled that the detective had probable cause to search the vehicle, and that as the vehicle had already come into police custody, the search and seizure were "not in violation of any constitutional rights" (R. 25.).

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The State obtained a conviction based in part upon the evidence of petitioners' possession of the cargo of hams and of the bolt cutters. From paint particles found on the bolt cutters, a forensic chemist, called as a witness for the State, identified the tool as being the same one used to break the enclosure at the burglarized meatpacking plant. (R. 46.)

On assignment of error, the Court of Appeals of North Carolina held that the officer knowing "he must impound the truck until the windshield could be repaired", merely fulfilled his duty to inventory the cargo to protect the owner from loss and himself from liability. (App. B), 193, S.E.2d at 772. Further, the court held that assuming the bolt cutters were the poisonous fruits of the unlawful confession, their admission was harmless error as there remained other evidence "more than sufficient to support their convictions", (App. B, pp. 2a-6a), 193 S.E.2d at 772. The Supreme Court of North Carolina denied a petition for certiorari to review the decision of the Court of Appeals (App. A, p. 1a).

REASONS FOR GRANTING THE WRITS

I. Writs Should Be Issued To Determine the Validity of a Police Search of a Motor Vehicle Absent Probable Cause of Any Offense Other Than a Traffic Violation.

1. The writs should be granted because this Court has never decided the recurring constitutional question of whether in stopping a motorist for a traffic violation the police may properly conduct a general exploratory search of the vehicle without probable cause to believe that any offense other than a traffic violation has occurred. Also, the court below decided the case in a

manner probably inconsistent with the applicable principles announced by this Court.

In *Dyke* v. *Taylor Implements Mfg. Co.*, 391 U.S. 216, 220 (1967), this Court in holding constitutionally invalid the search of an automobile at a time and place remote from arrest, specifically reserved decision on the issue here presented, of "[w]hether or not a car may constitutionally be searched incident to arrest for a traffic offense . . .". This question and the inextricably related question of the validity of a search of the person, incident to an arrest for a traffic violation, have recurrently vexed state and federal courts, giving rise to a conflict among them which this Court should resolve.[3]

The most dramatic indication of the need for this Court's intervention is the conflict arising between the two federal appellate courts sharing jurisdiction within the District of Columbia. Compare *U.S.* v. *Robinson*, D.C. Cir., No. 23-734, decided October 31, 1972 (*en banc*), cert. granted, No. 72-936, March 19, 1973, 41

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[3] For those cases holding such a search to be invalid, see e.g., *Stidham* v. *Wingo*, 452 F.2d 837 (6th Cir. 1971) *United States* v. *Davis*, 441 F.2d 28 (9th Cir. 1971); *Barrentine v. United States*, 434 F.2d 636 (9th Cir. 1970); *United States* v. *Humphrey*, 409 F.2d 1055 (10th Cir. 1969); *Grundstrom* v. *Beto*, 273 F. Supp., 912 (N.D. Tex. 1967); *United States, ex rel. Krogness* v. *Gladden*, 242 F. Supp. 499 (D. Ore. 1965); *United States* v. *One 1963 Cadillac Hardtop*, 224 F. Supp. 210 (E.D. Wis. 1963); *People* v. *Superior Court of Los Angeles County* [*Simon*], 101 Cal. Rptr. 837, 496 P.2d 1205 (*en banc*). Also see cases cited, *U.S.* v. *Robinson*, *supra* sl. op. at pp. 37 and 38, n. 39. Recent cases holding to the contrary are e.g. *U. S.* v. *Simmons*, D.C. Ct. App. No. 6511, decided March 8, 1973, 12 Cr. L. Reptr. 2536; *State* v. *Gustafson, Fla.* 258 So.2d 1 (1972); *State* v. *Giragosian*, — R.I. —, 270 A.2d 921 (1970); *State* v. *Coles*, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969); *Watts* v. *State, Miss.*, 196 So.2d 79 (1967); *Lane* v. *State*, 424 S.W.2d 925 (Tex. Cr. 1967).

L.W. 3493, in which the United States Court of Appeals for the District of Columbia held such a search invalid, with the decision of the District of Columbia Court of Appeals in *U.S.* v. *Simmons,* D.C. Ct. App., No. 6511, decided March 8, 1973, 12 Cr. L. Reptr. 2536, sustaining the lawfulness of a general exploratory search of the person.

Moreover, this Court has already granted certiorari in *U.S.* v. *Robinson, supra,* to review the propriety of searches of the person upon an arrest for a traffic violation. Accordingly, the Court should take the occasion presented by the instant case to review together the closely related constitutional questions of searches of a vehicle and of the person under similar circumstances.

In addition, the courts below decided the question in a manner probably inconsistent with the principles announced by this Court. For, in dealing with searches of vehicles,[4] other than for weapons within reach of the occupants, the Court has observed that the cases have "always required that the officers conducting the search, have 'reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search' ". *Dyke* v. *Taylor Implements*

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[4] The action of the patrolman here in climbing upon the truck to look into the bed entailed all of the attributes of a search, whether characterized as such or as a police inventory. (The inventory question is discussed in section 2, *infra.*) Here, the officer inspected places closed from public or general view, using "some measure of force or intrusion". *State* v. *Ashby,* Fla. 245 So.2d 225, 227 and cases cited. Accord. *Holland* v. *State,* 93 Okla. Cr. 180, 226 P.2d 448 (1951), where the officer climbed upon the fender of a truck to see over the side boards into the cargo.

Mfg. Co., 391 U.S. 216 (1967). Even pursuant to investigative stops based upon objective considerations giving rise to a reasonable suspicion, "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* v. *Ohio,* 392 U.S. 1 (1967). Here, the search was neither based upon probable cause of the commission of an offense for which further evidence was necessary, nor upon the need for a circumscribed search for weapons. See *U.S.* v. *Robinson, supra.*

2. The reliance by the Court of Appeals, below, upon the characterization of the officer's action as an inspection or inventory incident to impoundment of the vehicle, raises an important issue of what distinguishes an inventory from a constitutionally regulated search and seizure. In this case, the theory of a police inventory was first introduced as a justification for the police's conduct by the Court of Appeals below. Neither the police officer nor the trial court intimated that the cursory examination of the cargo was prompted by the usual considerations underlying an inventory, which are to secure the owner against loss and to protect the officer from liability. Nor, does the evidence disclose any of the ordinary indicia of such an inventory such as a systematic enumeration and recording of the quantity and nature of the cargo. (R. 11-16.)

The court below wrongly assumed that under Virginia law the truck could not have been driven until the windshield was replaced. For, as the Virginia patrolman testified "you have to have your entire windshield or nothing at all, you can't have a cracked glass", (Tr. 30). Therefore, upon removing all of the windshield the vehicle would have been operable. In-

deed, rather than calling a tow truck (which incidentally, would not have necessitated a police inventory), the patrolman had a second officer drive the truck to the sheriff's office.

An unauthentic or sham inventory can no more be squared with the Fourth Amendment's guarantees than can a search based upon an improper arrest. See *Carroll* v. *U.S.*, 267 U.S. 132 (1925); *Weeks* v. *U.S.*, 232 U.S. 383 (1914). Indeed, such pretextuous inventories have been condemned by other courts (see e.g. *U.S.* v. *Adams*, 424 F.2d 175, (5th Cir. 1970); *Gonzales* v. *State*, — Okla. Cr. —, 12 Cr. L. Rptr. 2537 (decided March 13, 1973)), and to sustain one is clearly inconsistent with the applicable principles announced by this Court.

3. Another important issue raised here is whether a police inventory is constitutionally valid where the impoundment is not authorized by statute or other appropriate authority. The Court of Appeals below disregarded the absence of any Virginia statute which would authorize the officer to seize or impound the truck.[5] Thus, in effect, the court held that an inven-

[5] The Court of Appeals below cited no Virginia statute or regulation which authorized the patrolman to impound or seize the vehicle here. While various provisions of the Virginia Code authorize impoundment or seizure in specified circumstances, such as where the vehicle had been used to transport contraband liquor, stolen animals or other stolen goods (Code of Virginia, Sec. 4-56, 18.1-103, 18.1-107.1); where a vehicle is being operated without a license or with a suspended license, (Sec. 46.1-351.1); or where damages have been inflicted on another in an automobile accident, (Secs. 8-646.3 to 8-646.5); our research has disclosed no such authority for impoundment pursuant to an arrest for reckless driving or operating with defective equipment, the offenses for which Petitioner All was cited. See Code of Virginia, Sec. 46-1-179, (App. D, p. 8a).

(footnote continued on page 11)

tory pursuant to an unauthorized police impoundment is permitted by the Fourth Amendment.

Moreover, the North Carolina court's decision on this issue most probably conflicts with such decisions of this Court as *Cooper* v. *California,* 386 U.S. 58 (1967) where one of the factors relied upon in sustaining the validity of a search of the automobile was that it had been lawfully impounded under state law. See *Harris* v. *United States,* 390 U.S. 234, 237 (1968) (Douglas J. concurring) where Mr. Justice Douglas articulated as the basis for holding evidence admissible that it was discovered in the car, while the car was lawfully in police custody. Also, an inventory not justified as the product of an authorized impoundment conflicts with the principles in *Terry* v. *Ohio, supra,* requiring that warrantless searches be strictly limited by the purposes which justify them. This view has been adopted by other courts which have passed on the question.[6]

4. Since there was no legal basis for the police to impound or seize the truck operated by Mr. All, the Court should explore the question of whether the police had any duty or justification in taking even temporary custody of the vehicle for safekeeping absent the owner's express authorization. The court below assumed that the police had to impound the vehicle rather

(footnote 5 continued . . .)

Section 46.1-2 of the Virginia Code provides that if a vehicle is left on the highway in a position which constitutes a hazard to traffic or if it is left unattended on the highway for more than 24 hours, the police "may remove it or have it removed to the nearest storage garage for safekeeping". However, in the instant case neither of these two criteria were shown to have existed. In any event, the police here did not act in accordance with this section by removing the truck to a storage garage.

[6] *Williams* v. *U. S.*, 107 A.2d 223 (D.C. Mun. Ct. App. 1961); *Pigford* v. *U. S.*, 273 A.2d 837 (D.C. Ct. App. 1971); *U. S.* v. *Pannell,* 256 A.2d 925 (D.C. Ct. App. 1969).

than leave it on the road, or call a tow truck. However, one court, at least, has held in similar circumstances that the police may not seize or inventory a vehicle even for the purpose of securing it without the driver's permission. *People* v. *Miller,* 7 Cal. 3d 219, 101 Cal. Reptr. 860, 496 P.2d 1228 (1972). The court there said, "the inventory search violated the Fourth Amendment's proscription of unreasonable searches and seizures, [and] the vehicle owner's interest in privacy outweighs any conflicting interests in the preservation of the owner's property during that period when he was absent from his car." *Ibid.* at p. 863.

Moreover, even assuming the impoundment to be lawful, in *Harris* v. *United States,* 300 U.S. 234 (1968), this Court reserved decision on that very issue. There, it held that a police officer's action in rolling up the window of a *lawfully* impounded car t oprotect it from the rain, did not constitute a search or inventory and, therefore, that the evidence found in the course of such action was admissible. However, the Court indicated that a police regulation requiring a general search and inventory of all impounded vehicles presented a serious constitutional issue under the Fourth Amendment, an issue which the Court decided that it need not reach under the facts of that case.

5. Assuming that in some exigent circumstances the police may be justified in taking temporary custody of a vehicle incident to an arrest, the decision below raises the question of whether such custody and a related inventory search may be initiated before the defendant has been accorded a right to make bail and thus to avoid detention. In the instant case Petitioner Ronald All was arrested for reckless driving. For such an offense Section 46.1-179 of the Code of Vir-

ginia (App. D. *infra* p. 8a) required the officer to take Petitioner All forthwith before the nearest or most accessible judicial officer for a hearing to determine whether All should be detained on the traffic offense or admitted to bail. However, the search of All's vehicle which the Court of Appeals below characterized as police inventory, occurred on the highway before Mr. All had been arrested and before it had been determined by the magistrate that he should be detained. Accordingly, the purported inventory took place before it became apparent that temporary police custody of the vehicle would be necessary.

This question, not previously decided by the Court, is currently before it in *U.S.* v. *Robinson,* D.C. Cir. No. 23-734, decided October 31, 1972, cert. granted, No. 72-936, March 19, 1973, 41 L.W. 3493. Moreover, the decision below holding that such premature inventory constitutes a reasonable search conflicts with the applicable principles announced by the Court. The requirement of *Terry* v. *Ohio, supra,* that searches must be limited by the purposes for which the arrest or police check was made, are applicable here, and prohibits inventories unless they are tied to the clearly established need for the police to take custody of the automobile. See, *U.S.* v. *Adams,* 424 F.2d 175 (5th Cir. 1970). Other courts which have dealt with the problem and with the related problem of a predetention search of the person have so held.[7]

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[7] *U.S.* v. *Mills,* — F.2d —, D.C. Cir., No. 22, 444, decided May 10, 1972 (*en banc*); *U.S.* v. *Robinson, supra; Carpio* v. *Superior Court, County of Santa Barbara,* 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971); *California* v. *Mercurio,* 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); *People* v. *Overlee,* 483 P.2d 222 (Colo. Sup. Ct. En Banc, 1971); *People* v. *Greenwood,* 484 P.2d 1217 (Colo. Sup. Ct. En Banc, 1971).

The foregoing questions involve important Constitutional problems which affect a large segment of the citizenry. For, traffic offenses probably bring more citizens into confrontation with the police than any other kind of law violation. "Very few drivers can traverse any appreciable distance without violating some traffic regulation". *U.S.* v. *Robinson, supra,* sl. op. p. 21. Consequently, the Court should grant certiorari to give authoritative guidance in this area.

II. The Court Below Adopted an Erroneous Standard for the Application of This Court's "Harmless Constitutional Error" Doctrine.

The Court of Appeals below erroneously held as "harmless constitutional error" the admission into evidence of the bolt cutters found in the truck operated and occupied by the petitioners. The confession of Ronald All which led directly to the discovery of this evidence was found to have been unlawfully obtained. Also, this evidence was the product of a warrantless search of the vehicle under bailment to Petitioner Weaver, which search was clearly remote in time and place from the arrest and unlawful under *Preston* v. *U.S.,* 376 U.S. 364 (1964).[8]

Nevertheless, the admission into evidence of the bolt cutters was held to be harmless error because the "remaining evidence .... was more than sufficient to support [the] convictions," (App. B., p. 5a). By so holding, the court below formulated a standard which had the effect of equating the "harmless constitutional error" rule with the standard applicable to a motion

[8] Though the Court of Appeals below suggested that there may have been other potential sources of knowledge of the cutters, the detective who seized them unequivocally testified that he learned of them from All's confession (R. 17). In any event, the decision of that court turned on harmless error rather than on the question of an untainted source (App. B pp. 4a-5a).

for directed verdict. This was plainly inconsistent with the applicable decisions of *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) and *Chapman* v. *California,* 386 U.S. 18 (1967).

As stated in *Fahy,* the appropriate standard "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Further, as the Court there said, "We are not concerned here with whether there was sufficient evidence on which the Petitioner could have been convicted without the evidence complained of." 375 U.S. at 86-87.

The contributory effect of the evidence relating to the incriminating bolt cutters was direct and compelling. It was the single item of evidence that unequivocally linked the petitioners to the scene of the crime, by virtue of the chemist's positive identification of that tool as being the one employed to burglarize the meat packing plant. (R. 46.) To be sure, there was other evidence, but it was all less conclusive. Fibers from a sweater similar to one worn by Mr. Weaver were found at the point of the break-in (R. 45-57). A truck generally matching the description of the one driven by Mr. All was seen in the vicinity of the packing plant on the night of the robbery. (R. 27-28). Finally, of course, the cargo of hams found in the possession of the petitioners was of the same quantity and character as those stolen, though the company distributed large numbers of such products throughout the southeastern states (R. 40).

Particularly as the evidence of the cargo should also have been excluded, the remaining untainted evidence plainly is not so overwhelming as to justify a ruling of harmless error. "An error in admitting plainly

relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless." *Chapman* v. *California,* 386 U.S. at 23-24.[9]

CONCLUSION

For the foregoing reasons, the petitioners request that their petitions for writs of certiorari be granted.

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[9] *Harrington* v. *California,* 395 U.S. 250 (1969), relied upon by the court below is clearly distinguishable. There the untainted evidence, including a valid confession of the defendant and eye witness testimony, was so overwhelming as to completely override the evidence erroneously admitted. Moreover, the Court there said:

> We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. 395 U.S. at 254.

APPENDIX

APPENDIX A

No. 14PC FIFTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1973

STATE OF NORTH CAROLINA

v.

RONALD EUGENE ALL
CARLTON OSCAR WEAVER

Order Denying Petition for Writ of Certiorari to the N. C. Court of Appeals (7215SC777)

This matter came on to be considered upon a petition for writ of certiorari to the N. C. Court of Appeals to review its decision on the 6th day of March, 1973, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the said petition should be denied.

NOW, THEREFORE, it is ordered accordingly by the Court in conference that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the N. C. Court of Appeals and to counsel for all the parties.

Witness my hand and official seal, this the 7th day of March, 1973.

???? J. NEWTON
Clerk of the Supreme Court

(Seal)

cc: Loflin, Anderson & Loflin, Attorneys at Law
Harris & McEntire, Attorneys at Law
Mr. Herbert F. Pierce, Solicitor
Mr. Howard P. Satisky, Assistant Attorney General

APPENDIX B

No. 7215SC777 FIFTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1972

STATE OF NORTH CAROLINA

v.

RONALD EUGENE ALL and
CARLTON OSCAR WEAVER

From Chatham

Appeal by defendants from McKinnon, Judge, 8 May 1972 Session of Superior Court held in Chatham County.

Defendants were charged in separate bills of indictment with felonious breaking or entering and felonious larceny.

The State's evidence tended to show the following. During the early hours of the morning of 20 March 1971 the premises of Hickory Mountain Farms, Inc., in Siler City, N. C., was unlawfully broken and entered and a large quantity of meat (packaged hams and loose hams) was unlawfully stolen therefrom. At about 2:10 a.m. on 20 March 1971 a "bluish truck" with wooden siding was observed driving away from the vicinity of Hickory Mountain Farms, Inc. At about 7:20 a.m. on 20 March 1971 a trooper with the Virginia State Police observed a blue truck travelling north on Route 220 in Virginia. Except for ten or twelve inches of glass on the driver's side the entire windshield of the truck was covered with cardboard. Driving with a windshield in such condition constitutes an offense in the State of Virginia, and therefore the trooper stopped the truck. Defendant All was driving and defendant Weaver was riding in the cab on the passenger side. Defendant All was placed under arrest

and defendant Weaver disappeared from the scene (he was arrested later in the day). The trooper inspected the load in the bed of the truck by stepping up on the axle or the wheel and looking over the wooden siding—there was no top cover on the bed of the truck. He observed loose hams and boxes with Hickory Mountain Farms, Inc., written on them. Another trooper, who called to the scene, drove the truck to the Franklin County jail. After defendant All was in custody for the motor vehicle violation, the Virginia State Police received, by radio, information of the theft of hams from Hickory Mountain Farms, and an investigator for the Virginia State Police went to the Franklin County jail to interrogate defendant. While the truck was still parked at the Franklin County jail, the investigator looked through the right side window of the cab of the truck and observed a large set of bolt cutters lying on the floorboard. These bolt cutters were found to have paint chips similar to the paint on the security bars which were cut on the Hickory Mountain Farms, Inc., premises. The fibers from defendant Weaver's sweater were similar to the fibers taken from the glass of the broken window at the Hickory Mountain Farms, Inc., premises.

Statements made by defendant All at the scene after he was arrested were excluded from evidence because he had not been given the Miranda warnings. Statements made by defendant All during interrogation at the county jail were excluded from evidence because a hope of leniency was held out to him by the interrogating officer.

The defendants offered no evidence.

The jury returned verdicts of guilty as charged in both counts as to each defendant. Defendant All was sentenced to an active term of seven to ten years. Defendant Weaver was sentenced to an active term of ten years. Both defendants appealed.

Attorney General Morgan, by Assistant Attorney General Satisky, for the State.

Loflin, Anderson & Loflin, by Thomas F. Loflin, III, a nd Harris & McEntire, by Mitchell M. McEntire and Laura Jean Guy, for the defendant.

BROCK, *Judge.*

Defendants assign as error the admission of testimony by the Virginia State trooper of his observation of the load of hams in the cargo bed of the truck. They argue that the hams were not in "plain view" of the trooper because he had to climb up on the wheel or axle of the truck to see over the wooden siding. They argue, therefore, that the hams were discovered by means of a search which was not reasonably related to the offense for which All was arrested, which was not for purposes of protection or prevention of escape, and which was not founded on probable cause; and, consequently, was a search prohibited by the Fourth Amendment to the Constitution of the United States.

It seems to us that the arguments advanced by defendants are wide of the mark. In this instance, the officer knew he must impound the truck until the windshield could be repaired. Under such circumstances it was his duty to take reasonable precautions to protect defendants' cargo from loss or destruction. Also, it was his duty to protect himself and the State from charges of loss of cargo. In order to do these things it was necessary for him to know the nature and quantity of the cargo. His conduct in looking into the cargo bed was both reasonable and necessary under the circumstances. If his action can be classed as a search, it was certainly a reasonable search. It is only unreasonable searches which are prohibited by the Fourth Amendment. State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179. Once the trooper acquired knowledge of the cargo by a reasonable act, he was not required to

suppress this knowledge when the police radio bulletin later advised of the theft of a quantity of Hickory Mountain Farms hams.

The numerous cases relied upon by defendants are distinguishable upon the reason for the "search". For cases more comparable to the present case *See* 10 ALR 3d 314-354, § 9 [New] Making inventory of contents of impounded vehicle (Supp. 1972). In our opinion, the trooper's testimony concerning the load of hams was properly admitted in evidence.

Defendants next argue that the bolt cutters taken from the truck were found as a direct result of an illegal confession and, therefore, should have been excluded from evidence as was the confession itself. While there seem to have been sources of knowledge of the bolt cutters equally as clear as that obtained from the excluded confession, we do not feel it is necessary to dwell upon the question in this case. Conceding, arguendo, that the bolt cutters were the fruit of an illegal confession, their admission in evidence would constitute harmless error beyond a reasonable doubt. The remaining evidence against defendants was more than sufficient to support their convictions: a truck similar to theirs was seen driving from the vicinity of the break-in; the unequivocally identified stolen hams in defendants' possession in Virginia a few hours after the break-in; and fibers found at the scene of the break-in which matched one defendant's sweater. If it were error to admit the bolt cutters in evidence, in view of the total evidence, we hold such error to be harmless beyond a reasonable doubt. *See* Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726; State v. Doss, 279 N.C. 413, 183 S.E. 2d 671; State v. Bell, 14 N.C. App. 346, 188 S.E. 2d 593.

We have carefully considered defendants' assignment of error relating to the allowance of opinion testimony by

one of the State's witnesses. Without belaboring the point, it is our opinion the evidence justified the trial court's finding that the witness was qualified to testify in the field of forensic chemistry. This assignment of error is overruled.

No error.

Judges CAMPBELL and GRAHAM concur.

A True Copy

THEODORE C. BROWN, JR.
Clerk of the Court of Appeals
of North Carolina

By ?? ?? ?? ?? ?? ?? ??
Deputy Clerk
January 23, 1973

APPENDIX C
Excerpted Amendments to the Constitution of the United States

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Excerpted Sections of the Code of Virginia (in effect on March 20, 1971)

§ 46.1-178. Arrest for misdemeanor; release on summons and promise to appear; admitting to bail; violations.—(a) Whenever any person is arrested for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, such time to be at least five days after such arrest unless the person arrested shall demand an earlier hearing, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour, and before a court having jurisdiction under this title within the city, town or county wherein such offense was committed. Such officer shall thereupon and upon the giving by such person of his written promise

to appear at such time and place forthwith release him from custody.

(b) Any person refusing to give such written promise to appear shall be taken immediately by the arresting or other police officer before the nearest or most accessible judicial officer or other person qualified to admit to bail having jurisdiction under this title.

(c) Any person who wilfully violates his written promise to appear, given in accordance with this section, shall be guilty of a misdemeanor, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

(d) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and subject to removal therefrom upon complaint filed by any person in a court of competent jurisdiction. This section shall not be construed to limit the removal of a police officer for other misconduct in office. (Code 1950, § 46-193; 1950, p. 94; 1954, c. 174; 1958, c. 541.)

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§ 46.1-179. When arresting officer shall take person befor judicial officer.—If any person is: (1) Arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person; (2) believed by the arresting officer to have committed a felony; (3) believed by the arresting officer to be likely to disregard a summons issued under § 46.1-178; (4) charged with reckless driving; the arresting officer, unless he issues a summons, shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178, who shall determine whether or not probable cause exists that such person is likely to disregard a summons, and may issue either a summons or warrant as he shall determine proper. (Code 1950, § 46-194; 1958, c. 541; 1966, c. 639).